80-1071

Supreme Court, U.S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO.

DONALD GILBERT SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the failure to state affirmatively on the record what facts, if any, justify imposing a sentence nearly four times harsher upon a Defendant for identical conduct underlying his earlier conviction by plea bargain, (and with essentially identical presentence investigation reports) shows Constitutionally prohibited vindictiveness after successful appeal.

II. Whether reindictment upon all six original counts, after successfully setting aside a sentence imposed in excess of the understood maximum to the charge upon which a Defendant entered a bargained for guilty plea, rather than granting specific performance of the original plea bargain, constitutes forbidden prosecutorial vindictiveness chilling Defendant's exercise of his due process rights.

III. Whether denial of a Section 2255 Motion without hearing is permissible when a lack of facts justifying a harsher sentence exists on the record.

IV. Whether Defendant properly raises these issues, first fully presented upon a Motion for Reconsideration upon his direct appeal, by this Section 2255 Motion.

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v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on September 15, 1980.

OPINIONS BELOW

The United States District Court for the Northern District of Ohio, Eastern Division, by the Honorable Robert Krupansky, issued an Opinion and Order of the trial court on September 21, 1979, (Case Number C79-809A), and a further opinion on October 31, 1979, denying Petitioner's Motion for New Trial and Hearing. Neither opinion is published; they are attached hereto as Appendix C, D and Appendix B respectively. The

United States Court of Appeals for the Sixth Circuit affirmed the judgment of the trial court on September 15, 1980, without opinion. (Case Number 79-5422). The Court's order is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (Appendix A) was entered on September 15, 1980, denying Petitioner's cause presented pursuant to 28 U.S.C. section 2255. This petition for writ of certiorari invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. section 1254 (1).

QUESTIONS PRESENTED

I. Whether the failure to state affirmatively on the record what facts, if any, justify imposing a sentence nearly four times harsher upon a Defendant for identical conduct underlying his earlier conviction by plea bargain, (and with essentially identical presentence investigation reports) shows Constitutionally prohibited vindictiveness after successful appeal.

II. Whether reindictment upon all six original counts, after successfully setting aside a sentence imposed in excess of the understood maximum to the charge upon which a Defendant entered a bargained for guilty plea, rather than granting specific performance of the original plea bargain, constitutes forbidden prosecutorial vindictiveness chilling Defendant's exercise of his due process rights.

III. Whether denial of a Section 2255 Motion without hearing is permissible when a lack of facts justifying a harsher sentence exists on the record.

IV. Whether Defendant properly raises these issues, first fully presented upon a Motion for Reconsideration upon his direct appeal, by this Section 2255 Motion.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTE INVOLVED

28 U.S.C. Section 2255:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdic-

tion, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless, it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. As amended May 24, 1949, c. 139, section 114, 63 Stat. 105.

STATEMENT OF THE CASE

Donald Gilbert Smith, Petitioner, was arrested and indicted on six counts charging violations of 21 U.S.C. sections 841, 841(a) (1), and 846 on September 26, 1974. Several other persons were indicted with him, in a nine count indictment. The indictment specified amounts of the controlled substances involved in each alleged offense. The Government had extensive Grand Jury hearings in August 1974, and had telephone taps on

Donald Gilbert Smith, and a taped conversation between Donald Gilbert Smith and Kathryn Carr. Armed with this information and evidence, the Government negotiated with Donald Gilbert Smith and his counsel, exchanging a plea of guilty to Count VI of the indictment for dismissal of the remaining five counts and a recommendation of not more than five years' imprisonment. On December 9, 1974, Donald Gilbert Smith entered his plea of guilty. In the course of the Rule 11 examination, no explanation of mandatory special parole was given. A presentence investigation was ordered.

On February 12, 1975, Donald Gilbert Smith was sentenced by the Court to four years' imprisonment and three years' special parole.

Defendant filed a petition pursuant to 28 U.S.C. section 2255 to vacate his plea and sentence because he was not informed of the effective length of his sentence regarding special parole. The Sixth Circuit Court of Appeals upheld the petition, and remanded the matter to the District Court for vacation of sentence and setting aside the plea for entry of a new plea. *United States v. Smith,* 546 F. 2d 424 (6th Cir. 1976).

Donald Gilbert Smith was held for twenty-seven (27) days after the sentence was vacated, during which time the United States Attorney dismissed the old charge and obtained a superseding indictment reinstating the original six counts against Smith. After nearly two years of imprisonment on the first charge, Donald Gilbert Smith was not given the opportunity to plead anew to the remaining charge, but was required to stand trial upon all six counts, five of which had been dismissed and which he had no intention of reviving by having his sentence correctly imposed.

At trial, the Government's case consisted chiefly of substantively impeaching their own witnesses with prior inconsistent testimony before the Grand Jury - the very testimony in the Government's possession at the time of the first plea and sentencing. The jury returned verdicts of guilty on all six counts on March 30, 1977. On April 22, 1977, Donald Gilbert Smith was sentenced to a total of 15 years' imprisonment and 12 years' special parole, after a presentence investigation. The 1975 and

1977 presentence investigations, part of the record below, are essentially identical. At sentencing, the trial Court stated that at the first sentencing he was familiar with the presentence investigation, and had considered only the offense pled to. He relied on the new presentence, and the trial evidence of the magnitude of the drug operation and Defendant's "key role" therein to impose the harsher sentence. No facts from the new presentence or of conduct occurring *after* the original sentence were stated in support of the sentence. Defendant asserts that a review of both reports shows no new facts or identifiable conduct after the original sentence upon which the Court could rely for increasing the sentence. The Government knew the factual strength of its entire case against Donald Gilbert Smith prior to February 12, 1975, and the presentence report is designed to present the Government's and the Defendant's version of the facts to the sentencing judge. Petitioner asserts that comparison of the presentence investigation of 1974-75 with the trial testimony and the report of 1977 does *not* reveal any of the objective facts required by *North Carolina v. Pearce,* 395 U.S. 711 (1969), before a harsher sentence is imposed after the exercise of a procedural right.

Upon direct appeal, Petitioner's counsel briefed and argued that the reindictment placed Defendant in double jeopardy. Smith himself (by Supplemental Brief *pro se*) attempted to raise the issues of vindictiveness in the reindictment and/or increased sentence and failure of the District Court to follow the mandate of the Sixth Circuit by permitting him to plead anew to the original charge. At the end of its opinion (Case No. 77-5281), the Sixth Circuit sua sponte raised the question of the propriety of the new indictment in light of the mandate issued, and summarily determined it to be proper. *United States v. Smith,* 584 F. 2d 759 (6th Cir. 1978). Donald Gilbert Smith, by new counsel, moved for rehearing on the issues of vindictive prosecution and sentence, but rehearing was denied on December 15, 1978. Petition for writ of certiorari to the United States Supreme Court was denied on April 23, 1979.

Thereafter, on April 30, 1979, Defendant filed a petition pursuant to 28 U.S.C. section 2255, to vacate, modify, or correct

his sentence, imposed contrary to due process and in violation of his plea bargain agreement and the Sixth Circuit's mandate. The United States District Court for the Northern District of Ohio, Eastern Division denied the motion on September 21, 1979, without hearing. Defendant's motion for new trial and for hearing was overruled on October 31, 1979. Appeal was taken to the United States Court of Appeals for the Sixth Circuit on November 30, 1979. After briefing and argument, the Sixth Circuit affirmed the District Court without further opinion, on September 15, 1980. The Petitioner hereby presents this Court with his timely petition seeking writ of certiorari to the lower Court.

REASONS FOR GRANTING THE WRIT

I.

NO FACTS EXIST OR ARE AFFIRMATIVELY STATED ON THE RECORD WHICH JUSTIFY THE IMPOSITION OF AN ALMOST FOUR-FOLD SENTENCE UPON DEFENDANT FOR THE IDENTICAL CONDUCT UNDERLYING HIS INITIAL CONVICTION AND SENTENCE, AND A HARSHER SENTENCE AFTER SUCCESSFUL EXERCISE OF DEFENDANT'S RIGHTS IS THEREFORE UNCONSTITUTIONALLY IMPOSED.

After indictment and conviction in 1974, Defendant received a four year imprisonment, three year special parole sentence. A Section 2255 Motion succeeded because of sentencing irregularities. After identical indictment and multiple conviction in 1977, Defendant received, cumulatively, a 15 year imprisonment, 12 year special parole sentence. On its very face, this sentence operates as a warning to all not to seek reimposition of sentence in accord with Rule 11 (d). The realistic likelihood or actuality of vindictiveness is unavoidable.

To date no explanation has been offered for sentencing Donald Gilbert Smith so much more harshly. There are no objective and stated findings of Defendant's indentifiable conduct *after* February 2, 1975 on the record to justify the harsher sentence.

The Government asserted in its brief in the direct appeal that facts occurring before the original sentence may have come to the Court's attention during trial. The Court does not indicate in the sentencing transcript anything more than the weight of the evidence and the scope and magnitude of the drug operation in which Smith played a "key role." All of these reasons are not identifiable conduct *after* the original sentence. Indeed, these reasons are markedly devoid of *facts.* Furthermore, the two presentence reports show that the "scope and magnitude" and Smith's position in the drug operation were equally known to the Court at initial sentencing. No new facts appear on the sentencing record.

The Court, in sentencing Petitioner, stated he had evaluated the new presentence investigation. He did not cite any facts from that report which differed from facts available to him at the first sentencing or which related to subsequent conduct of Defendant, much less facts sufficient to justify a four times harsher sentence. *Marano v. United States,* 374 F. 2d 583 (1st Cir. 1967). A comparison of the two reports reveals no later conduct by Defendant to support a severer sentence and no significant difference in the Government's case against Smith. Surely, Smith having stood trial cannot be used to increase his sentence, especially when he did not desire to reopen his entire cause. *See United States v. Derrick,* 519 F. 2d. 1 (6th Cir. 1975) (no matter how overwh lming the evidence of guilt, sentence cannot be increased because a Defendant went to trial); *United States v. Stockwell,* 472 F. 2d 1186 (9th Cir. 1973) (a breakdown in negotiations cannot result in a harsher sentence unless facts show the sentence imposed was "soley upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty." *Id.* at 1188).

In denying the section 2255 motion here in issue, the District Court stated that *Pearce, supra,* limited only more severe punishment for the same offense. The Court went on to indicate that for the particular offense of which Defendant had been

previously convicted, he actually received a lesser sentence (4 years imprisonment, 2 years special parole). Only the aggregate sentence was harsher, which the Court justified because Smith had been convicted of five additional offenses. However, the conduct was the same and was known to be the same at the time of sentencing. The Court was aware of the five counts it dismissed on February 12, 1975, and by presentence report was also aware of the Government's version of Smith's involvement in all six counts. Yet, the sentence the Court imposed after plea of guilty was not even the maximum allowable sentence. Thus, the Court had exercised his discretion to the fullest. *See United States v. Andrews,* 612 F. 2d 235 (6th Cir. 1979).

To sentence Smith after successful appeal and trial to the severe sentence as imposed, given the same information and circumstances upon which two years earlier the Court had not even imposed the maximum sentence, surely raises the spectre of judicial vindictiveness as a "realistic likelihood." This is not a case where the original offense did not provide a "sufficient" penalty, and thus the Court took advantage of the opportunity to expand beyond the maximum sentence available to be imposed the first time. This is a case where a Defendant received an additional sentence on the same facts and circumstances, after the sentencing Judge had exercised his sentencing discretion fully and had decided to impose less than the maximum in 1975. Smith's rights were violated by this sentence, and this Court should exercise its power to correct the Constitutionally inadequate proceedings below and to modify the sentence to comport with fairness and justice under all the premises, ie., to impose sentence as imposed before or up to the bargained for maximum of five years.

II.

REINDICTMENT ON ALL SIX COUNTS, RATHER THAN SPECIFIC PERFORMANCE OF THE PLEA BARGAIN OR ENTRY OF A NEW PLEA TO THE OLD CHARGE, WAS IMPROPER AND VINDICTIVE AND CHILLS THE EXERCISE OF DUE PROCESS RIGHTS.

With full knowledge of Smith's alieged involvement with controlled substances, the Government negotiated a plea of guilty to one charge and dismissed the other five counts against Defendant in the 1974 indictment. Due to an omission to explain the existence and meaning of mandatory special parole to Defendant at plea and sentencing, this guilty plea was vacated. *United States v. Smith,* 546 F. 2d 424 (6th Cir. 1976). Smith had already been incarcerated for almost two years.

Before Smith could plead anew, as directed by the Sixth Circuit, the Government dismissed the old indictment and had the Grand Jury return a six count indictment identical to the 1974 indictment. No reason or basis for this action existed. Although content in 1974 to have Defendant convicted on Count VI and serve no more than five years imprisonment for conduct known as well in 1974 as in 1977, the United States Attorney responded to Petitioner's successful assertion of his rights by reinstituting five dead charges against him. Smith sought performance of his plea bargain and explanation of his potential sentencing liability. He received a six count indictment and a nearly four-fold sentence.

The extent of the prejudice to Smith is emphasized when one considers that *United States v. Timmreck,* 441 U.S. 780 (1979), now makes the failure to inform of mandatory parole a technical violation which is not a collateral attack upon *conviction,* but only sentence. Thus, under *Timmreck,* Smith would have received the remedy he sought, vacation of sentence and remand to be sentenced properly for the original single offense with which he had been convicted. To permit the Government herein to accomplish a vacation of conviction and to reinstitute

proceedings on five new charges as well, is to give the Government absolute discretion to accomplish a vindictive purpose which even a Court is precluded from accomplishing under *Timmreck.*

Once the prosecution elects to accept a guilty plea to less than the original indictment, it cannot retry a Defendant on the full indictment and thereby exact a greater penalty. *Ward v. State,* 444 P. 2d 252 (Okla. Cr. App. 1968). Prosecutorial actions which exact a penalty for the exercise of a procedural right thereby creating the reasonable fear of vindictive motivation, the realistic likelihood of vindictiveness, or actuality of vindictiveness are violations of the principles of due process. *Blackledge v. Perry,* 417 U.S. 21 (1974); *United States v. Andrews, supra.* How can such an action be said not to discourage seeking a remedy?

A retrial "seeking a heavier penalty for the *same acts* as originally charged is inherently suspect" as vindictive. *United States v. Preciado-Gomez,* 529 F. 2d 935, 936 (9th Cir. 1976). At all times the Government acted with full cognizance of the conduct of Donald Gilbert Smith upon which the charges against him were based. No new offenses were alleged or proven. In effect, the Government punished Donald Gilbert Smith for asserting his constitutional and statutory rights by proceeding with a course of action open to them in 1974, but abandoned in return for the guilty plea.

In the situation where the Government has fully exercised its discretion and actually carried that decision through and obtained a conviction

> absent an explanation encompassing *factors unknown or nonexistent* at the time of the original decision was made it could fairly be assumed that the sole factor intervening between such decision and the shift to a more punitive position - the defendant's exercise of a protected right - played a part in the determination. Hence, a reasonable apprehension of the realistic likelihood of vindictiveness might arise. *United States v. Andrews, supra.* (Emphasis added).

What intervened between the Government's decision in 1974

and the decision in 1977 is even more critical to Petitioner's cause, because he stood convicted and was serving his sentence. Without Smith's exercise of his protected right, the Government would not even have had the opportunity to reverse the essentially final decision made in 1974. The Government must explain its action and dissipate the glaring evidence of vindictive intent and effect. The Government never has offered an explanation in defense of this action.

Santobello v. New York, 404 U.S. 257 (1971), lays guidelines to enforce plea bargains. Therein it is recognized that the minimum remedy is specific performance of the bargain. *Id.* at 262-263. The Defendant's choice should be given great weight. (Op. Douglas, J., concurring, at 267). Sentencing before a different judge is indicated. *E.g., United States v. Grandinetti,* 564 F. 2d 723 (5th Cir. 1977).

Herein, Smith had already served almost half of his imprisonment; prejudice would result unless specific performance were required. *United States v. Brown,* 500 F. 2d 375, 378 (4th Cir. 1975). A defendant who relies on promises "has a right to have those promises fulfilled," *Palermo v. Warden, Green Haven State Prison,* 545 F. 2d 286, 296 (2d Cir. 1976), through specific performance, *Petition of Geisser,* 554 F. 2d 698, 706 (5th Cir. 1977): the opportunity to replead is an unrealistic remedy. Surely, the "opportunity" to replead to five new counts and be sentenced consecutively on them is no remedy at all. Petitioner has never rescinded his part of the bargin, he has merely sought to hold the Government to its, and to have the Court properly impose sentence.

III.

PETITIONER IS ENTITLED TO A HEARING TO ADDRESS THE DISPUTED FACTS OF THE LACK OF OBJECTIVE CRITERIA JUSTIFYING THE PROSECUTOR'S REINDICTMENT AND/OR THE COURT'S SIGNIFICANTLY HARSHER SENTENCE.

Donald Gilbert Smith is entitled to relief from his sentence if that sentence is significantly harsher without there being objective, neutral facts on the record to dissipate both the realistic likelihood and the actuality of vindictiveness by either the prosecution or the Court. *Blackledge v. Perry,* 417 U.S. 21 (1974); *North Carolina v. Pearce,* 395 U.S. 711 (1969).

The new counts and harsher sentence, standing by themselves, create a prima facie case of vindictiveness (and reasonable apprehension thereof) by the prosecution and/or the Court for Smith's having exercised his procedural right to an explanation of the sentence he exposed himself to by pleading guilty in 1974. An evidentiary hearing at which Smith can offer proof, of prosecutorial vindictiveness and of the lack of sufficient objective criteria concerning conduct occurring *after* the first sentence which was known to and relied upon by the Judge in imposing the new sentence, is therefore the minimum required. Once this likelihood of vindictiveness is established, the Government bears the heavy burden of justifying its actions and those of the Court by proving valid neutral facts alone led to the reindictment and the harsher sentence. Those facts must affirmatively appear on the record and must dispel the likelihood of vindictiveness which Petitioner has established. *United States v. Andrews, supra.* At the very least, the Government should be required to explain, and if the explanation is inadequate, Petitioner is entitled to relief.

Under Rule 8, Section 2255 Motions, a hearing must be held unless the files and record "conclusively show" that the petitioner is warranted relief "under no circumstances." *Fontaine v. United States,* 411 U.S. 213, 215 (1973). Smith's proof that no new facts of the alleged crimes which can be detailed on the record were known to the Government between the plea bargain of 1974 and the indictment of 1977 would entitle him to relief. Also, it is necessary for the judge to name the *new information,* not known to him at the first sentencing and developed from Defendant's conduct *after* the sentencing, which justifies the new sentence, beyond the statement that five new convictions were involved.

The fact of the reasonable apprehension and/or actuality of vindictiveness is the essence of the due process violation claimed by Smith. *E.g., Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978); *United States v. Andrews, supra.* The literalistic fact that Smith was convicted of more offenses, despite it being for the same known conduct, is no answer. The "ante" was increased for Petitioner for no identifiable reason - certainly none in the records or files - other than his pursuing his remedies. The realistic likelihood of vindictiveness required a hearing, and a distinction between underlying *offenses* and *charges* being made.

IV.

THESE ISSUES ARE PROPERLY RAISED BY A SECTION 2255 MOTION.

Section 2255 provides a remedy for offenders seeking correction of their sentences. Section 2255 is neither a substitue for appeal nor is it a means to relitigate an appeal. Section 2255 is available to litigate issues upon which a full and fair consideration has not yet occurred. *Kaufman v. United States,* 394 U.S. 217 (1969).

An analysis of the appellant's brief and the Court's opinion in Case No. 77-5281, *United States v. Smith,* 584 F. 2d 759 (6th Cir. 1978), demonstrates that none of the issues here presented was given the kind of full and fair consideration which precluded their being advanced at this time. Defendant's appellate counsel attacked the reindictment on Counts I-V on the grounds of double jeopardy. Prosecutorial vindictiveness was not raised. Neither was judicial vindictiveness in sentencing raised. No ruling on those issues was reached in the Court's opinion. Defendant had attempted, inartfully, to raise these issues and that of specifically performing the plea bargain, but the questions were never truly briefed until Motion for Rehearing was filed. Thus, Defendant did not waive his ability to raise these issues; neither

were they fully litigated nor considered by the Court in its opinion.

The only full briefing of these issues was never utilized by a Court to consider the claim and reject it on its merits. Denials of rehearing and of certiorari in no way amount to full and fair consideration on the merits comparable to appeal. These issues are just now being *litigated.* Only if *disposition* of the precise points raised in the 2255 motion had occurred by an appellate court *deciding the issue* against the Defendant is the motion not well taken. *Kaufman, supra* at 230; *Stephens v. United States,* 341 F. 2d 101 (10th Cir. 1965); *United States v. Sorenson,* 308 F. Supp. 1268, 1271 (E.D. N.Y. 1970) (adjudication on the merits required). The benefit of counsel and argument are deemed necessary to assure painstaking consideration and full examination of the issues. *Tooisgah v. United States,* 186 F. 2d 93 (10th Cir. 1950); *see DiAngelo v. United States,* 406 F. Supp. 880 (E.D. Pa. 1976).

> *While it has not been asserted as a ground of error,* it should be noted that the previous remand of this Court on November 22, 1976, contained the following instruction:
>
> > To vacate the sentence imposed, to set aside the plea of guilty entered by appellant as hereinabove set forth, and to permit him to enter a new plea to the within charge.
>
> On December 29, 1976, The Defendant's conviction and sentence were vacated.
>
> Before a new plea was entered, the 1974 indictment was dismissed, and on January 31, 1977, a new indictment was returned to which appellant pleaded not guilty to all counts. Since appellant's sentence and plea were vacated and a new plea of not guilty to identical charges was entered, it is clear that the mandate of this Court was carried out. 584 F. 2d at 764. (emphasis added).

This summary dismissal of the ground for error does not qualify as previous hearing *Heard v. United States,* 390 F. 2d 866 (D.C. Cir. 1968).

CONCLUSION

Petitioner was resentenced in a manner specifically disapproved of in *North Carolina v. Pearce, supra,* since no facts in support of harsher sentence exist or are noted on the record.

Petitioner was reindicted after successful prosecution of a Section 2255 Motion on a ground recognized in *United States v. Timmreck, supra,* not to permit vacating a conviction. Furthermore, the reindictment violated the Sixth Circuit's own standards for prosecutorial vindictiveness, iterated in *United States v. Andrews, supra,* but not applied for Petitioner's benefit by the Sixth Circuit herein.

At the very least, if the fourfold sentence for identical criminal activity is not an outright Constitutional violation, Petitioner is entitled to a hearing to prove the existence of vindictiveness and right-chilling activity.

The conflicts within the Sixth Circuit itself and with this Court's standards in the *Pearce* series of cases militate toward granting the requested Writ of Certiorari.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that a copy of the foregoing was sent by First Class United States Mail this 15th day of December, 1980, to William C. Bryson & Terence J. Lynam, Attorneys, Department of Justice, Washington, D.C. 20530.

WILLIAM T. WHITAKER
Attorney for Petitioner-Appellant

FILED
SEPT. 15, 1980

No. 79-5422

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DONALD GILBERT SMITH :
Petitioner-Appellant, :

v. : ORDER

UNITED STATES OF AMERICA :
Respondent-Appellee, :

Before WEICK and CELEBREZZE, Circuit Judges and JOINER, District Judge.*

Upon consideration of the briefs, appendix and oral arguments of counsel, it is ordered that the judgment of the District Court denying the motion of the petitioner-appellant Smith to vacate sentence pursuant to Section 28 USC 2255, be and it is hereby affirmed for the reasons stated in the Memorandum and Order of District Judge Krupansky.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

Clerk

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*Honorable Charles W. Joiner, United States District Judge for the Eastern District of Michigan, sitting by designation.

FILED
OCT. 31, 1979

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,) *Plaintiff-Respondent,*)	CIVIL ACTION NO. C79-809A
v.)	
DONALD GILBERT SMITH,) *Defendant-Petitioner,*)	ORDER

KRUPANSKY, J.

By motion filed October 1, 1979, petitioner, Donald Gilbert Smith (Smith) seeks reconsideration of this Court's Order of September 20, 1979 denying his petition to vacate, modify or correct sentence pursuant to 28 U.S.C. 2255.

Petitioner's motion fails to direct the Court's attention to any argument or authority not previously considered. It is therefore the conclusion of this Court now, as it was on September 20, 1979, that an examination of the record in this proceeding conclusively demonstrates that the increase in Smith's sentence upon retrial was not motivated by vindictiveness on the part of the sentencing court. As this Court stated in its Order denying Smith's petition to vacate his sentence:

> "athough in the aggregate, Smith's sentence upon retrial was significantly harsher than his initial sentence, the increment reflects the fact that upon retrial, Smith was convicted of five additional crimes:
>
> * * *
>
> ...the aggregate increase in sentence was due to the fact that, upon retrial, Smith was sentenced on five additional counts."

See, United States of America v. Donald Gilbert Smith, Case No. C79-809A (N.D. Ohio September 20, 1979), slip. op. at 5.

Accordingly, petitioner's motion for reconsideration is hereby denied.

IT IS SO ORDERED.

/s/ Robert B. Kraupansky

United States District Judge

SEPT. 21, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,)	**No. C79-809-A**
Plaintiff-Respondent,)	
v.)	
DONALD GILBERT SMITH,)	
Defendant-Petitioner,)	**ORDER**

In accordance with the Memorandum and Order herein on Sept. 20, 1979,

IT IS ORDERED that the motion of defendant-petitioner to modify, vacate or correct sentence, pursuant to Title 28, Sec. 2255, U.S.C. is hereby denied.

/s/ Robert B. Kraupansky

ROBERT B. KRUPANSKY
United States District Judge

SEPT. 20, 1979

THE UNITED STATES DISTRICT COURT
THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff-Respondent*	)	**CIVIL ACTION No. C79-809-A**
v.	)	
DONALD GILBERT SMITH, *Defendant-Petitioner,*	)	**MEMORANDUM AND ORDER**

KRUPANSKY, J.

This is a proceeding upon a Motion to Vacate, Set Aside or Correct Sentence instituted by the petitioner, Donald Gilbert Smith (Smith), pursuant to 28 U.S.C. 2255.

A review of the record in this proceeding discloses the following facts. On September 26, 1974, Smith was indicted on a six-count indictment; the first count charging conspiracy in violation of 21 U.S.C. (sec.) 841 and 846 and the remaining five counts charging substantive offenses of possession with intent to distribute and distribution of controlled substances, in violation of 21 U.S.C. (sec.) 841 (a) (1). On December 9, 1974, Smith voluntarily entered a plea of guilty to Count VI of the indictment, and on February 12, 1975, the remaining five counts were dismissed. Also on February 12, 1975, Smith was sentenced by this Court to a four-year prison term and three years of special parole. *See, United States v. Smith,* Case No. CR74-427 (N.D. Ohio, February 12, 1975).

On appeal, the Sixth Circuit Court of Appeals found the judgment of conviction defective for failure of the trial court to advise the defendant of the mandatory special parole term required to be imposed pursuant to 21 U.S.C. (sec.) 841 (b) (1) (B) and remanded the case to this Court with instructions to vacate

the guilty plea and judgment and sentence imposed thereon and "to permit (Smith) to enter a new plea to the within charge." *See, Smith v. United States,* Case No. 76-1560 (November 22, 1976), 546 F. 2d 424 (6th Cir., 1976). Thereafter, on December 29, 1976, pursuant to the mandate of the Sixth Circuit Court of Appeals, the plea of guilty entered by the defendant on December 9, 1974 and the sentence imposed thereon were vacated by this Court. *See United States v. Smith,* Case No. CR74-427 (N.D. Ohio, December 29, 1976).

On January 29, 1977, a superseding six-count indictment was filed with this Court charging Smith with the same criminal violations as charged in the original indictment, *United States v. Smith,* CR77-18, and on January 31, 1977, the original indictment was dismissed.

Smith then entered pleas of "not guilty" to all six counts contained in the superseding indictment, and on March 30, 1977, following a trial by jury, a verdict was returned finding him guilty on all six counts. Thereafter, on April 22, 1977, Smith again appeared before this Court for sentencing. He was sentenced to an aggregate of fifteen years imprisonment and twelve years of special parole. *See, United States v. Smith,* Case No. CR77-18 (N.D. Ohio, April 25, 1977). On appeal, Smith's convictions were affirmed by the Sixth Circuit Court of Appeals on August 11, 1978. *See United States v. Smith,* 584 F. 2d 759 (6th Cir., 1978) *cert. denied,* ____U.S.____ (April 23, 1979).

Smith has now petitioned this Court to "vacate, modify or correct" the sentence imposed by this Court on April 25, 1977. In support of his petition, Smith argues that the sentence is unconstitutional because it is a significantly harsher sentence than the one originally imposed on February 12, 1975. Relying on *North Carolina v. Pearce,* 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), Smith asserts that the harsher sentence imposed on him following his successful appeal of the original sentence is the result of "vindictiveness" and violative of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

In *North Carolina v. Pearce, supra,* the petitioner-Rice had pled guilty to four separate charges of second-degree burglary

and he was sentenced to prison terms aggregating ten years. These convictions were subsequently set aside, however, in a state *coram nobis* proceeding on the ground that Rice had not been accorded his constitutional right to counsel. He was then tried upon three of the charges, convicted and sentenced to prison terms aggregating twenty-five years. The district court granted habeas corpus relief concluding that in imposing a significantly harsher sentence upon retrial, the sentencing court was "punishing petitioner Rice for his having exercised his postconviction right to review." In affirming the district court's grant of habeas corpus relief, the United States Supreme Court condemned the unexplained three-fold increase in Rice's sentence upon retrial and held that the Due Process Clause of the Fourteenth Amendment required that vindictiveness on the part of the sentencing judge against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives following his subsequent conviction upon retrial.

North Carolina v. Pearce, supra, is inapppsite to the case at bar. The *Pearce* Court, at 2075, framed the precise issue before it to be:

> "the Constitutional limitations upon the imposition of a more severe punishment after conviction *for the same offense* upon retrial." (emphasis added).

Unlike the petitioners in *Pearce,* Smith was not given a harsher sentence upon retrial *for the same offense.* Smith's initial sentence of February 12, 1975 (four-year prison term and three years of special parole) was imposed by reason of his conviction (following a voluntary guilty plea) on only one count of the original indictment; Count VI. The remaining counts had been dismissed. The Court's Judgment and Order of Commitment entered February 12, 1975 reads as follows:

> IT IS ADJUDGED that the defendant upon his plea of guilty and the Court being satisfied there is a factual basis for the plea has been convicted of the offense of having knowingly possessed with intent to distribute and having distributed lysergic acid diethylamide, a Schedule 1 con-

trolled substance, in violation of Title 21, Sec. 841 (a) (1), U.S.C. as charged in Count VI of the Indictment...

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of four (4) years.

IT IS FURTHER ORDERED that the defendant is fined the sum of Ten Thousand ($10,000.00) Dollars, said fine to be a committed fine.

IT IS FURTHER ORDERED that a special parole term of three (3) years is imposed under the provisions of Title 21, Sec. 841 (a) (1), U.S.C.

By contrast, the sentence imposed on Smith on April 25, 1977 was imposed by reason of his convictions (following a jury trial) on all six counts of the superseding indictment. In its Judgment and Order of Committment issued on April 25, 1977, this Court stated:

IT IS ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offenses of having conspired to distribute controlled substances, in violation of Title 21, Sec. 841 (a) (1), U.S.C., as charged in Count I of the Indictment, and of having possessed controlled substances with intent to distribute, in violation of Title 21, Sec. 846, U.S.C., as charged in Counts II, III, IV, V and VI of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

* * *

IT IS ADJUDGED that the defendant is hereby commit-

> ted to the custody of the Attorney General or his authorized representative for imprisonment for a period of three (3) years on Count I, plus a special parole term of two (2) years pursuant to Title 21, Sec. 841 (b) (1) (A), U.S.C., two (2) years on Count II, plus a special parole term of two (2) years, to run consecutively to Count I; two (2) years on Count III, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I and II; two (2) years on Count IV, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I, II and III; two (2) years on Count V, plus a special parole term of two (2) years, to run consecutively to the sentences imposed on Counts I, II, III and IV; and four (4) years on Count VI, plus a special parole term of two (2) years, and a fine in the amount of Ten Thousand ($10,000.00) Dollars, to run consecutively to the sentences imposed on Counts I, II, III, IV and V.

Consequently, although in the aggregate, Smith's sentence upon retrial was significantly harsher than his initial sentence, the increment reflects the fact that upon retrial, Smith was convicted of five additional crimes.

Moreover, it bears emphasis that that portion of the sentence imposed on April 25, 1977 which relates to Smith's conviction on Count VI of the superseding indictment is even somewhat more lenient than the sentence imposed on February 12, 1975 with respect to Smith's prior conviction on that same count. Thus, it is clear that Smith was not given "a more severe punishment after conviction for the same offense upon retrial."

In summarizing the precedents controlling this issue, the United States Supreme Court, in *Blackledge v. Perry,* 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 628 (1974), stated at 2102:

> "The lesson that emerges from *Pearce, Colten* and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after [successful] appeal but only by those that pose a realistic likelihood of vindictiveness."

To guard against the possibility of vindictiveness entering into the resentencing process, the *Pearce* Court went on to hold that:

> "In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

It clearly appears from the record in this proceeding that the increase in Smith's sentence upon retrial was not motivated by vindictiveness on the part of the sentencing court. Rather, the aggregate increase in sentence was due to the fact that, upon retrial, Smith was sentenced on five additional counts. Furthermore, the sentence imposed with respect to each count is within the statutory limit permissible for that paricular crime. Under these circumstances, the imposition of a more severe sentence upon retrial following a successful appeal of the original sentence infringes no constitutional rights.

As a second ground for his motion, Smith challenges his reindictment on all six counts following this Court's order vacating his initial guilty plea to Count VI. It is Smith's contention that since Counts I through V of the original indictment had previously been dismissed, and since the Court of Appeals ordered that he be permitted to enter a new plea to the "within charge", he should not have been reindicted on all six counts but rather should have been permitted to enter a new plea to Count VI only.

In *Kaufman v. United States,* 394 U.S. 217, 89 S. Ct. 1068, 1074, 22 L. Ed. 2d 227 (1969), the United States Supreme Court, while recognizing that new issues could, under proper circumstances, be raised in a (sec.) 2255 motion, made it clear that a federal court before which a (sec.) 2255 motion is pending need not entertain a collateral attack on a prior federal court's determination of the same issue. The Court stated at 2074, n. 8:

> "Similarly, where the [federal] trial or appellate court has had a 'say' on a federal prisoner's claim, it may be open to the (sec.) 2255 court to determine that on the basis of the motion, files and records, the prisoner is entitled to no relief."

See also, Stephan v. United States, 496 F. 2d 527 (6th Cir. 1974), *cert. denied,* 423 U.S. 861 (1974); *Van Buskirk v. United States,* 343 F. 2d 158 (6th Cir., 1965). A review of the record in this case discloses that upon appeal of Smith's convictions on all six counts of the superseding indictment, the Sixth Circuit Court of Appeals *sua sponte* raised the issue advanced here by petitioner and disposed of it. In *United States v. Smith,* 584 F. 2d 759 (6th Cir., 1978) the Court stated at 764:

> "While it has not been asserted as a ground of error, it should be noted that the previous remand of this Court on November 22, 1976, contained the following instruction:
>
> > To vacate the sentence imposed, to set aside the plea of guilty entered by appellant as hereinabove set forth, and to permit him to enter a new plea to the within charge.
>
> On December 29, 1976, the defendant's conviction and sentence were vacated.
>
> Before a new plea was entered, the 1974 indictment was dismissed, and on January 31, 1977, a new indictment was returned to which appellant pleaded not guilty to all counts. Since Appellant's sentence and plea were vacated and plea were vacated and a new plea of not guilty to identical charges was entered, it is clear that the mandate of this Court was carried out.
>
> The convictions are hereby AFFIRMED."

It is clear from the above-quoted language that the Sixth Circuit Court of Appeals, of its own volition, considered the propriety of reindicting Smith on all six counts. In concluding, however, that its prior mandate had been "carried out," the Court clearly indicated that it found nothing objectionable to Smith's reindictment. Accordingly, petitioner is not now entitled to relitigate that same issue.

Alternatively, inasmuch as petitioner relies on *Blackledge v. Perry, supra,* the Court notes that the case does not control the case at bar. In *Blackledge,* the United States Supreme Court applied the principles enunciated in *North Carolina v. Pearce, supra,* to prohibit from reindic-

ting a convicted misdemeanant on a felony charge after the defendant had initiated appellate review of his misdemeanor conviction. The Court emphasized the possibility of vindictiveness on the part of the prosecutor entering into the indictment process. However, in *Blackledge,* after appealing his initial conviction, the defendant was indicted on a different and more serious charge. In the instant case, after having his initial conviction set aside, Smith was reindicted on the same charges on which he had originally been indicted. Thus, the potentiality for vindictiveness on the part of the prosecutor found to exist in *Blackledge* is not present in the instant case.

As further grounds for his motion, petitioner asserts that (1) the trial court's instruction to the jury on entrapment constituted prejudicial error, and; (2) his reindictment on all six counts caused him to be placed in double jeopardy with respect to Count VI. These arguments were also considered and rejected by the Sixth Circuit Court of Appeals. *See, United States v. Smith,* 584 F. 2d 759, 761-763 (6th Cir., 1978), *cert. denied,* ____U.S.____ (April 23, 1979). Accordingly, this Court will not entertain a collateral attack on that court's determination of those issues. The Court has considered petitioner's other contentions and finds them to be equally without merit.

In view of the foregoing and following a comprehensive review of the motion, files and records in this proceeding, the Court concludes that the petitioner is entitled to no relief. The Motion to Vacate, Modify or Correct Sentence is therefore denied.

IT IS SO ORDERED.

/s/ Robert B. Kraupansky

United States District Judge